BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

The essential facts, together with the jurisdictional facts, have been stated in the petition and we do not repeat them here for reasons of brevity.

POINT I.

The Appropriate Unit.

The decision of the Board in selecting as the appropriate collective bargaining unit 32 employees out of the large number of 6500 stands out as a most unprecedented determination.

The Board has considered many other woolen mill cases. In none of them has it gone so far as to select a unit similar to the unit selected in the instant case.

Oregon Worsted Co., 2 N. L. R. B. 417;
American Woolen Co., 5 N. L. R. B. 144;
California Wool Scouring Co., 5 N. L. R. B. 782;
Spray Woolen Mill, 5 N. L. R. B. 393;
Colonie Fibre Co., Inc., 9 N. L. R. B. 658;
Atlanta Woolen Mills, 11 N. L. R. B. 167;
Rock River Woolen Mills, 18 N. L. R. B. 828;
Barre Wool Combing Co., 19 N. L. R. B. 1008;
Crown Worsted Mills, 21 N. L. R. B. 1028;
Washougal Woolen Mills, 23 N. L. R. B. 1;
Arlington Mills, 31 N. L. R. B. 21.

In Botany we have an integrated organization with employees whose work is closely coordinated and whose joint

efforts create finished cloth from raw wool. There are 6500 of these employees. Does the Board have the power to select a small number, 32, and call this number a unit appropriate for collective bargaining? Is there any limit to the power of the Board? Can it create two hundred of such units in one plant? These are questions that must be answered.

It is not unreasonable to conclude that a number of small organized units throughout a plant could and probably would seriously hamper production. The Board has given recognition to the reasonableness of this conclusion by virtue of the fact that never in the past has it selected a similar unit. In fact, the Board has affirmatively decided that a unit of sorters and trappers is not an appropriate unit. This decision was made by the Board almost simultaneously with its decision in the *Botany* case. We refer to the *Arlington Mills* case, which decision came down approximately one week after the *Botany* decision (*Arlington Mills, supra*). A close examination of the facts of both cases reveals that they are identical. Both companies were engaged in the manufacture of woolen goods. Both had so-called departments of sorters and trappers. Both departments performed identical work. Employees were interchanged within the plant in both companies. Both companies were partially organized. In both companies there had been an attempt to organize on a plant-wide basis. The unions in each case would admit to membership all of the employees of the mills. Both companies had highly integrated manufacturing processes and both had a single labor or personnel director. In both cases the unions claimed to have members in other parts of the plant.

It is impossible to discover a closer set of facts in any decision. It would seem that an administrative board

would have to pass on both cases in the same manner. The Circuit Court of Appeals, Seventh Circuit, has established the desirability of consistency in administrative rulings in *N. L. R. B.* v. *Mall Tool Co.*, 119 F. (2d) 700. It was therein stated at page 702:

> "(2, 3) Consistency in administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily. Under such circumstances, affirmative orders violate administrative discretion and become punitive, rather than remedial measures, outside the scope of the Board's powers. *Republic Steel Corp.* v. *N. L. R. B.*, 311 U. S. 7, 61 S. Ct. 77, 85 L. Ed. ——; *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126; *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 59 S. Ct. 490, 83 L. Ed. 627, 123 A. L. R. 599."

Nevertheless, in the *Arlington* case, the Board determined that the unit was not appropriate and in the *Botany* case, the Board determined that the unit was appropriate. The decisions are completely inconsistent, although made within one week of each other. The Board itself in its decision made absolutely no attempt to differentiate between the two cases. The Board clearly bases its decision upon its so-called "policy" that in all cases collective bargaining should be made immediately available to the employees. The language of the Board's decision is:

> "* * * Wherever possible, it is obviously desirable that, in a determination of the appropriate unit, we render collective bargaining of the company's employees an immediate possibility.
>
> * * *
>
> Consequently, even if under other circumstances, the wool sorters or trappers would not constitute the most

> effective bargaining unit, nevertheless, in the existing circumstances, unless they are recognized as a separate unit, there will be no collective bargaining agent whatsoever for these workers" (Bd. A. 12).

This policy has by inference been approved in the decision of the Circuit Court of Appeals.

Neither in the decision of the Board nor in the decision of the Circuit Court of Appeals is an attempt made to justify why collective bargaining should not be made immediately available to Arlington employees and yet should be of such prime importance to Botany employees.

Petitioner, by this appeal, directly questions the power of the Board to apply such a policy, both in view of the fact that no such policy has been declared by Congress in the Act, and also because of the peculiar circumstances of this case. The policy has never received express judicial approval and, so far as petitioner knows, has never been directly questioned in any other case. Petitioner challenges the Board to show its legislative authority to adopt such a policy.

The present language of the Act provides that the Board has the power to select a craft unit, a plant unit, an employer unit, or subdivision thereof (28 U. S. C. A. Sec. 159, Subdiv. (b)). The language of the Act was not always in this form. While the Act was under consideration in the Legislature, the language read: "craft unit, plant unit, employer unit, or any other unit" (House Committee Report No. 1371, 74th Congress, First Session). This language was criticized in committee and a report made to the House of Representatives on this point. Congressman Connery, as Chairman of the Committee, submitted the Committee Report to the First Session of the 74th Congress on May 21, 1935 specifically referring to

paragraph 9-b of the Act (that which gave the power to select the appropriate unit). It was stated:

> "House Amendment #11 which redrafted section 9(b) embodied two changes from the Senate Bill. The first change undertook to express more explicitly the standards by which the Board is to be guided in deciding what is an appropriate unit. The conference agreement accepts this part of the amendment. The amendment also added a proviso designed to limit the otherwise broad connotation that might be put upon the phrase 'or other unit'. The proviso, however, was subject to some misconstruction and the conferees have agreed that the simplest way to deal with the matter is to strike out the undefined phrase 'other unit'. It was also agreed to insert after 'plant unit' the phrase 'or subdivision thereof'. This was done because the National Labor Relations Board has frequently had occasion to order an election in a unit not as broad as 'employer unit' yet not necessarily co-incident with the phrases 'craft unit' or 'plant unit'; for example, the 'production and maintenance employees' of a given plant."

The above criticism of the Act shows clearly that Congress was deeply concerned with the question of appropriate unit. It intended to limit the authority of the Board in this respect. The language was changed from "plant unit, or other unit" to "plant unit, or subdivision thereof". This language modifies "appropriate unit". There is nothing else in the committee reports on this point. There is nothing in the Act and nothing in the committee reports which would give rise to any inference of authority on the part of the Board to adopt an independent policy of its own to make collective bargaining immediately available to employees, without awaiting the existence of a majority in a type of unit specified by the

phraseology of the Act. The Board is required to select the appropriate unit and nothing else. The language of the Act and the above report shows the intention of Congress clearly. The Board has nevertheless used its position to arbitrarily conceive the policy. Petitioner, again, challenges the Board's authority to invent such a policy.

The practical evils of the "policy" stand out in the instant case, when considered quite apart from the Board's lack of statutory power arbitrarily to create this unauthorized unit. Botany, the same as any other business organization, is an economic entity. In order to operate successfully, it must operate efficiently. In order to produce, it must operate efficiently. If the above "policy" of the Board is lawful and if two hundred other units of similar size were organized at Botany, perhaps by a number of different unions, and certified by the Board, Botany would be unable to operate or produce efficiently. In the long run, all of the employees, the other 6468 as well as the 32 sorters and trappers, would suffer. It is a definite possibility that, being unable to conduct its business efficiently, Botany might eventually close its doors, all of its employees losing their means of livelihood and all others losing the benefit of its production. This is not far-fetched. Our industrial history is full of instances in which labor difficulties have caused the failure of business organizations. To permit such a situation to exist is impossible. Under ordinary circumstances the citizens of this country could not afford to have their economic welfare endangered by the extremes that this decision of the Board makes possible. At the present time, when the production of goods and material is of such paramount importance for the actual existence of this country, such possibilities must be made impossible. Botany is now engaged largely in production for the war. Yet if the Board's decision applying its "policy" to the circumstances

of the instant case is sustained, industry will suffer from additional delays and difficulties in production.

The Board makes the hackneyed argument that Botany adopts an inconsistent attitude in refusing to bargain with a unit of 32 employees and yet expresses a willingness to bargain with 6500 employees. On the face of it, this frequently used argument sounds reasonable. On close inspection, its fallacy is apparent.

There are two desirable ends which must be balanced: (1) the rights of employees to collective bargaining representation; (2) the paramount necessity for efficient production. To throw either one out of balance might result in unjust treatment for the employees or production chaos for all.

It is quite obvious that an employer can accomplish the greatest efficiency of production in a plant with the least amount of labor friction. Obviously, small organized groups could and would provide greater labor friction than one large group or no group at all. So far as "policy" can enter into the decision at all, it is up to the Board and the courts which regulate the actions of the Board, to balance the rights of the employee against the great necessity for production. Is it not unbalanced in the instant case where the Board makes such a far-reaching decision as to select a group of 32 out of 6500? Should it not be recognized that even labor should bow to the common welfare of all during peace-time as well as during times of war?

The argument is also fallacious by reason of the fact that an employer in dealing with an unorganized group has a general labor policy developed by time and usage. In normal instances he is therefore not under the necessity of negotiating 6500 individual contracts where he has 6500 employees.

It is the general rule that in order to be sustained, the finding of an administrative board must be based on substantial evidence. *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197. Petitioner respectfully urges that the findings of the Board, far from being based upon substantial evidence, are not supported by any evidence whatsoever.

POINT II.

The agency of the Union was revoked by the employees.

We have pointed out that the circumstances of the *Botany* case are unusual. There is no direct precedent for the decision of the Board.

The Board virtually admitted that the sorters and trappers were really not an appropriate unit. The petition, therefore, could not be granted unless some extraordinary steps were taken. To accomplish its purpose, whether or not the purpose was authorized by the Act, the Board applied its so-called policy of creating an artificial "majority" so as to make bargaining immediately available to this tiny minority fraction of employees.

Under the circumstances of this case, it was most improper. When we consider the fact that the election was determined by exactly four votes (Bd. A. 16, 17), the decision appears most reprehensible.

The arbitrary nature of the Board's action is emphasized by its wilful and utter disregard of the wishes of the employees themselves. It was informed on numerous occasions that twenty of the employees did not desire to be represented by the Union and that they had so notified the Union shortly after the election (Bd. A. 117, 118) and long before the Union attempted, without justification, to

jockey Botany into a false appearance of refusing to bargain. The Board, of its own accord, should have used all means and machinery to investigate the situation and to determine the desires of the employees which it was created to protect. Paradoxically, it took the opposite view. It refused to issue subpoenas so that such testimony could be taken. It absolutely refused to consider such evidence at all (Bot. A. 45-a, 46-a, 45-a–75-a).

Botany's attorneys had no power to issue subpoenas. Under the Board's procedure, only the Board can issue subpoenas (Rules & Regulations of N. L. R. Bd., Sec. 21). By the refusal of the Board to act, Botany was rendered helpless as far as the production of this testimony was concerned. Such action by the Board and its agents has been severely criticized. In *Donnelly Garment Co.* v. *National Labor Relations Board*, 123 F. (2d) 215, the Circuit Court of Appeals stated at page 222:

> "The Trial Examiner refused to receive this evidence. He permitted the petitioners to make formal offers of proof.
>
> "The Trial Examiner seems to have confused the admissibility of this proffered testimony with his estimate of its weight and sufficiency and of the probable credibility of the witnesses who were to be called upon to give it. In his rulings he referred to the presence of the officers of the Company at the hearing and apparently he was of the opinion that if the Board's evidence was sufficient to justify a finding that the Donnelly Garment Workers' Union was fostered, supported or dominated by the Company, that would render the proffered testimony inadmissible. * * *
>
> "It was not shown that any of the employees of the Donnelly Company whose testimony was offered was under any disqualifying disability. There was no

> presumption that these employees would commit perjury, and, even if the Trial Examiner believed that they would perjure themselves, that would not have affected the admissibility of their evidence. It is elementary that there is a distinction between the admissibility of evidence and its weight or sufficiency. *National Labor Relations Board* v. *Bell Oil & Gas Co.*, 5 Cir., 98 F. 2d 870, 871. Surely if the testimony of an employee which tends to prove that an employer interfered with or supported the organization of an independent union is admissible, the testimony of an employee which tends to disprove domination and support of such a union by an employer is equally admissible. Evidence is relevant if it tends either to prove or to disprove any issue in a case."

The refusal of the Board to admit this testimony should receive sharp criticism.

In defense of its refusal to admit the testimony of the twenty employees, the Board argues that to have admitted the testimony at the time it first became available would make efficient administration impossible. In this respect the Board has still another "policy" not to be found within the four corners of the Act. The Board has declared that there is a presumption—apparently irrebuttable—of continuity; that once the status of a collective bargaining agent is ascertained, it is presumed—irrebuttably—that that status continues. The Act says nothing about this. The Act creates no presumption. The Act explicitly and as a matter of national policy (Sec. 1, fourth paragraph) gives to the employees "full freedom" to designate their collective bargaining agent.

Perhaps the Board can reasonably argue that in some circumstances the presumption—if rebuttable—adopted by it might be convenient, even though not authorized by the Act. The Board in fact has recognized by some decisions

that the presumption should be rebuttable by the Union under certain circumstances:

> *Valley Mould & Iron Corp.* v. *National Labor Relations Board*, 116 Fed. (2d) 760, 764-765 (C. C. A. 7);
> *International Assn. of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 81-83;
> *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 340;
> *National Labor Relations Board* v. *P. Lorillard Co.*, 314 U. S. 412;
> *Oughton* v. *National Labor Relations Board*, 118 Fed. (2d) 486 (C. C. A. 3);
> *National Labor Relations Board* v. *New Era Die Co.*, 118 Fed. (2d) 500, 505 (C. C. A. 3);
> *National Labor Relations Board* v. *Whittier Mills Co.*, 111 Fed. (2d) 474, 478 (C. C. A. 5).

An examination of these cases reveals that in every case the employer had been guilty of an unfair labor practice, usually to oust the union theretofore declared to be the collective bargaining agent.

Contrariwise, in the *Botany* case, the Circuit Court of Appeals has directly held that there is not the slightest evidence that Botany sought to coerce or influence its employees. There is therefore not the slightest reason why the presumption should not be rebuttable.

The ordinary meaning of a presumption is that it merely shifts the burden of going forward with the evidence. There was overwhelming evidence available to overcome the presumption in this case. The employees would have testified that even though at one time they had shown their desire for the Union, subsequently they desired to withdraw and to change that designation. This dependable evidence would have come from the mouths of the

employees themselves and from the Union officials on the very important point of representation. There is no question but that the Board should have admitted such evidence. The proceeding should have been reopened. The employees should have been given the "full freedom" of choice of agent expressly accorded to them by the Act.

We are in the field of administrative law. This field is supposed to be a liberal field. An administrative agency is created for the purpose of avoiding the technicalities of the law which sometimes cause undue hardships to individuals. The National Labor Relations Board was given the power to avoid these technicalities. Congress did not intend that the Board should adopt such a discriminatory and arbitrary attitude so as to close its mind and machinery to the true facts solely for alleged "policy" or "convenience".

To reopen the case and to have held another election would have been of little trouble to this Board. It was not a matter of holding an election among 6500 employees. It was merely a matter of holding an election among 32 employees. It would not have taken ten minutes to have held such an election. Slight inconvenience would have been caused. Nevertheless, the Board stubbornly adhered to its so-called presumption. It refused Botany an opportunity to rebut the presumption and gave the "full freedom" of the employees to express their desires absolutely no consideration.

POINT III.

The Unfair Hearings.

No citation of authority is needed to support the proposition that the constitutional guarantee of due process of law entitles every person to a fair and impartial trial.

The rules of evidence used in our courts of law are all directed toward this laudable end. It has been argued, not always correctly, that sometimes to prove or disprove a cause of action in a court of law is difficult because of the technical rules of evidence. Administrative law has recently developed with the avowed purpose of avoiding the aforesaid technical rules of evidence. Nevertheless, it is still a basic truth that every person is entitled to a fair hearing.

Morgan v. *U. S.*, 298 U. S. 468; 304 U. S. 1.

The requirements of a fair and impartial trial or hearing also apply to hearings involving unincorporated organizations, associations, corporations and in any forum where persons called officials pass upon the rights of other persons. It has become the rule that a person has not received a fair trial when any other person who has the power to pass upon his rights is biased or prejudiced.

Gilmore v. *Palmer*, 179 N. Y. Supp. 1;
Grassey Bros. v. *O'Rourke*, 153 N. Y. Supp. 493;
Plasterers and Stonemasons Union v. *Bowen*, 183 N. Y. Supp. 855, aff'd 198 App. Div. 967.

It has accordingly become the rule that wherever a person acting in a judicial or quasi-judicial capacity discovers that he has any connection with, or any bias or prejudice in, a matter, he automatically disqualifies himself. This basic principle applies to the National Labor Relations Board as well as to any other administrative organization. Yet, in the instant case, we find that the Board appointed as trial examiner in the election proceeding the attorney who made the original investigation for the purpose of bringing on the proceedings. Surely such a person could not be unbiased. Opinions are necessarily

formed in an investigation. The investigator is only human and, regardless of the effort he might use, his bias and prejudice must creep in at the hearing. He could not help but allow his bias and prejudice to affect his intermediate report to the Board and especially any recommendations that he might be called upon to make.

The Board has argued that a trial examiner has no power of determination. This is true. In many instances a supervisory employee has no power to hire and fire other employees, but merely has the right of recommendation and suggestion to the employer. Nevertheless, the Board has held that such a supervisory employee is improperly a member of a union because of the great weight that will be given by the employer to his recommendations. Similarly, the trial examiner exerts tremendous influence on the decision of the Board. His power of suggestion and his right of recommendation in his intermediate report, we would venture to say, are followed in the large majority of the cases. It is therefore extremely unfair to appoint as trial examiner a person who may allow bias or prejudice to creep into his rulings and into his recommendations to the Board proper.

The record of the instant case shows many occasions on which the trial examiner acted unfairly. One of the first such acts occurred when the trial examiner received in evidence a document offered by the Union, without deigning to read the same (Bot. A. 19-a). Botany was also prevented from cross-examining one of the witnesses upon the question of authority to bring the representation petition (Bot. A. 20-a, 21-a). At another point, the trial examiner refused to issue a subpoena requiring the production of the minutes of Local 343. It was the purpose to show that Local 343, the organization to which all of the employees belonged, had not authorized the bringing of the petition, but that the national union brought the

petition without any authority whatsoever from the employees or from Local 343. Also when Botany sought to obtain the names of the employees of Botany who were members of Local 343 for the purpose of determining their desires in the representation proceeding the trial examiner again denied the application (Bot. A. 33-a, 34-a, 35-a, 42-a).

These are only some of the unfair acts. The record clearly shows that the trial examiner had a biased and prejudicial attitude during the entire proceeding.

The Board was not faced with a situation where only one trial examiner was available. The Board has many such employees. It would seem that in all fairness it should have selected one of the others. Nevertheless, for some undisclosed reason, the Board elected in this case to use as the trial examiner the original investigator in the preliminary proceeding.

POINT IV.

The Question of Constitutionality.

It is an elementary principle that in order to be constitutional a statute must be definite. It must set forth sufficiently ascertainable standards so that its meaning may be determined. In the case of administrative boards it must set forth sufficiently ascertainable standards to indicate the limitation of authority and power on the part of the administrative board as a guide to the board. Nonconformance with this principle renders the statute unconstitutional.

Small v. *American Sugar Rfy. Co.*, 267 U. S. 233;
In re Di Torio, 8 F. (2d) 279;
Schechter v. *U. S.*, 295 U. S. 495.

It has been assumed that the National Labor Relations Act has undergone the test of the above principle in *Pittsburgh Plate Glass Co.* v. *N. L. R. B.*, 313 U. S. 146. In that case, the court stated:

> "We find adequate standards to guide the Board's decision."

That language is not controlling in the instant case, for the reason that in the *Pittsburgh* case the Board considered only the words "employer", "plant", and "craft". The court did not consider the phrase "plant unit or subdivision thereof". The latter phrase is the indefinite part of the Act. Since it was not considered in the *Pittsburgh* case, the constitutional question was not completely before the court. The decision in the *Pittsburgh* case is therefore merely dictum insofar as it may be claimed to be applicable to the attempted interpretation by the Board of the statute in the instant case.

It has heretofore been stated that the Board has conceived as a policy that wherever possible it is desirable that collective bargaining be made immediately available to the employees. The Board has interpreted the statute as meaning that it has the authority to create such policy. Under this alleged policy, there is absolutely no limitation and no standard for the Board to follow in determining appropriate subdivisions within the plant unit. The Board practically asserts that its decision was not made under the Act. It has affirmatively stated in its decision that it has not followed the standards set up by the Act, but has stepped beyond the requirements of the Act in order to effectuate its policy to make collective bargaining immediately available to a minority of the employees. If the Act permits of such interpretation as to the power and authority of the Board the Act is unequivocally unconsti-

tutional. If the Act does not permit of such an interpretation the Board has exceeded its power. In either event the Board's decision should be set aside.

Conclusion.

We respectfully submit that this case is one calling for the exercise by this Court of its supervisory powers in order that the serious and important questions which have been decided by the court below in such a manner as to constitute a departure from the accepted and usual course of judicial proceedings may be corrected and properly decided by this Court, and that to such end the petition for writs of certiorari should be granted.

PUTNEY, TWOMBLY & HALL,
Attorneys for Botany Worsted Mills,
Office & P. O. Address,
165 Broadway,
Borough of Manhattan,
New York City.

FREDERIC R. SANBORN,
THOMAS M. KERRIGAN,
Of Counsel.